SUPREME COURT, U.S.
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No. 92-521

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

EUGENE H. DUFFY, et al.,

Petitioners,

v.

JAMES W. WETZLER, et al.,

Respondents.

BRIEF OF RESPONDENTS CITY OF NEW YORK AND ITS FORMER AND PRESENT COMMISSIONER OF FINANCE IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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November 20, 1992.

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QUESTIONS PRESENTED

In addition to the two questions raised in the petition, a third issue is presented:

Whether the petitioners are barred from recovery of refunds, even if it were found that this Court's decision in Davis v. Michigan Dep't of Treasury is to be applied retroactively, because their payments to the City of New York were not made under protest or as a result of duress or because their is no basis to support their various causes of action against the City.

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No. 92-54

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

EUGENE H. DUFFY, et al.,

Petitioners,

v.

JAMES W. WETZLER , et al.,

Respondents.

On Petition for a Writ of Certiorari to
New York Supreme Court
Appellate Division-Second Department

BRIEF OF RESPONDENTS CITY OF NEW YORK AND ITS FORMER AND PRESENT COMMISSIONER OF FINANCE IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

For present purposes the statement of the case in the petition is accepted except to the extent that it uses pejorative adjectives and its

omission of matters included by us under this heading.

The petitioners' final complaint was described as the "Second Amended Verified Class Action Complaint." Paragraph "47" of this complaint alleged that for tax years 1985 to "the present" members of the "plaintiff class" made involuntary payments as a direct result of duress, doing so to avoid threatened interference with their liberty of person or to avoid threatened interference with their immediate possession of property (242)[1].

The answer of the City of New York to this complaint, in paragraph "THIRD," denied knowledge or information sufficient to form a belief as to the truth of allegation "47" (445). It also responded to the complaint's fourth

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[1] Numerals within parentheses, without letters attached, refer to pages of the original record on appeal.

cause of action, one seeking money had and received by the City. The answer, in paragraph "TWENTY-NINTH," pointed out that the complaint failed to state a cause of action because it did not specify any member of the class who made the tax payments under protest or duress (451). Paragraph "THIRTIETH" stated that recovery of taxes paid under a statute claimed to be unconstitutional or otherwise inapplicable to the taxpayer may be recovered in a plenary action only if the payments were made under protest or duress (451).

This argument also was raised in the City's memorandum of law in support of its cross-motion for summary judgment (City Memo., pp. 15-16; City Reply Memo pp. 22-23). At the trial court level the petitioners attempted to respond (Pet. Reply Memo. [dated February 7, 1990], pp. 102-103). The issue also was argued in the Appellate Division briefs (City

App. Br., pp. 20-23; Pltff-Resp. Cross-App. Br., pp. 65-68). It was even raised by the plaintiffs on their application to the New York Court of Appeals for permission to appeal to that Court (Pltffs.--Resps. Cross-App. Br., pp. 44-45).

Both the Appellate Division and the lower court upheld the City's position on this issue (17a, 36a-37a)[2]

SUMMARY OF ARGUMENT

Although the highest state court to rule in the instant case the, Appellate Division, rested its decision on the federal issue, it also relied on an independent and adequate state ground to reject petitioners' action for money had and received, designed to recover the taxes paid. The state ground is the New York rule that a

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[2] Numerals within parentheses followed by the letter "a" refer to pages of the Appendixes of the Petition for a Writ of Certiorari.

plenary action may not to be used to recover taxes paid unless the payment was made under protest or resulted from duress.

The petitioners have not established that it is appropriate to treat this matter, as subject to 42 U.S.C. 1983. Nor have they established any basis for their other causes of action against the City.

The grounds stated above should dispose of this matter against the City of New York without further review by this Court. The issue of retroactivity of the Davis case will only arise if these grounds for denying the petition against the City are rejected. In that event, it is our position that the Davis principle should be applied prospectively as advanced in our amicus curiae brief in Harper v. Virginia Dept. of Taxation (91-794). But we, nevertheless, join petitioners' request that Certiorari be granted since this issue is already before this Court in Harper so that our position against

retroactivity may be fully advanced on the argument.

POINT I

THERE CAN BE NO RECOVERY OF TAXES PAID IN A PLENARY SUIT UNLESS THE PAYMENTS WERE MADE UNDER PROTEST OR AS A RESULT OF DURESS. STATE GROUNDS ALSO DISPOSE OF THE OTHER CAUSES OF ACTION, ASIDE FROM THE 42 U.S.C. 1983 CAUSE, WHICH LACKS AN ADEQUATE BASIS FOR A PROCEEDING UNDER THAT SECTION.

a. In New York a tax payment may not be recovered unless it was paid under protest or as a result of duress.

Only two of the petitioners lived in New York City during the tax periods here involved. They are the Sweezys, husband and wife, and they are the only two who paid the City's income tax (228).

In New York a tax payment may not be recovered if paid voluntarily except by following the statutory administrative tax procedure. A payment under protest indicates that it was not voluntarily paid. Nor is a

payment regarded as voluntary when it is made as a result of duress, where present liberty of person or where immediate possession of needful goods is threatened by non-payment of the tax. Mercury Machine Imp. Corp. v. City of N.Y., 3 N.Y.2d 418, 424-25 (1957); Rochester v. Chiarella, 58 N.Y.2d 316, 323 (1983), cert. den. sub nom, Quality Package Supply Corp. v. Rochester, 464 U.S. 828 (1983). This principle applies to all kinds of taxes, as well as to fees. Taxes subject to the rule include: a business gross receipts tax, Mercury Machine Imp. Corp. v. City of N.Y., supra; a real estate tax, Rochester v. Chiarella, supra; a motion picture license fee, Paramount Film Distr. v. State of New York, 30 N.Y.2d 415, 418-19 (1972). See, also, Adrico Realty Corp. v. City of New York, 250 N.Y. 29, 32 (1928). And the intermediate appellate courts have, at least twice, ruled that the principle applies to personal income taxes. Matter of Fiduciary

Trust Co. v. State Tax Comm., 120 AD2d 848 (1986); Brady v. State of New York, 172 AD2d 17 (1991), app. dism, 79 N.Y.2d 915 (1992).[3]

The similar rule barring recovery of a tax paid without protest and not compelled by duress was originally followed with regard to federal taxes. Chesebrough v. United States, 192 U.S. 253 (1904). The rule was amended by the Federal Revenue Act of 1924. Moore Ice Cream Co. v. Rose, 289 U.S. 373, 376 (1933). The New York rule, however, has remained unchanged.

At the Appellate Division the petitioners asserted that there had been sufficient protest to entitle them to recovery. They relied on three cases for the proposition that, when protest is required, the commencement of a

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[3] Recently leave to appeal was granted and the case is scheduled for argument in the Court of Appeals on November 18, 1992. N.Y. Law Journal (11/12/92) p. 12.

legal proceeding at any time is sufficient. If this were true, the protest requirement would become a nullity since the commencement of any case with regard to the taxes would make any payment, no matter how many years earlier, a protested payment. In two of the cases the legal proceedings were commenced before the tax was paid. People ex rel. Wessell, Nickel & G. v. Craig, 236 N.Y. 100, 105 (1923); Corporate Property Investors v. Board of Assessors, 153 AD2d 656, 660 (1989). The pendency of such a proceeding is treated as the equivalent of protest. The third case relied on by petitioners merely states the general rule with regard to protest in the absence of duress. Rochester v. Chiarella 58 N.Y.2d 316 (1983).

In the State courts the petitioners did not rely on their own commencement of a legal proceeding. Instead they relied on an administrative challenge by a third party.

There also was no basis for any assertion that the tax payments were made under duress. The City tax law provides the following with respect to payment: Any tax due shall be a personal debt from the time it is due. Administrative Code of the City of New York (Admin. Code) §11-1751(n). It also provides for interest on underpayment of the tax. Admin. Code, §11-1784 (a)(4). Where a notice and demand for payment of a tax due is made and payment is not made within ten days, and no request for a hearing is made, a warrant may be issued. Admin. Code §11-1792 (b), (c). These provisions clearly do not constitute duress or compulsion. Rochester v. Chiarella, supra, 58 N.Y.2d at 322-325; Adrico Realty Corp. v. City of New York, supra, 250 N.Y. at 33-34 (1928); Title Guar. of Trust Co. v. City of New York, 265 App. Div. 304 (1942), aff'd, 290 N.Y. 910 (1943); National Heat Control

Corp. v. City of New York, 10 Misc. 2d 874, 875 (Sup. Ct., N.Y. Co., 1958).

In one of their briefs at the Appellate Division level the petitioners urged that their payments had been made under duress by reason of N.Y. Tax Law, Section 810, and N.Y. Penal Law, Sections 55.10 (2)(b) and 70.15(1)(a). The two Penal Law sections obviously have no direct relevance. The first describes which misdemeanors shall be deemed a class A misdemeanor. The second deals with the term for imprisonment under a class A misdemeanor.

The Tax Law section is entitled "Failure to pay tax." It applies, however, only to a person "who, with intent to evade any tax *** shall fail to pay the tax," and makes such a failure to pay a misdemeanor. If this provision made any failure to pay the tax a crime, it might be treated as constituting duress. The situation is different when the failure to pay

must be motivated by an "intent to evade" the tax. Obviously the petitioners are not claiming that they intended to evade the tax, but that this criminal provision led them to pay it.

(2)

The New York Court's ruling that the taxes paid may not be recovered since there was no protest or duress stands in the way of granting certiorari in that regard.

This Court will not consider a matter which has been decided by a state court on a state law ground which is independent of any federal ground and adequate to support the determination. Klinger v. State of Missouri, 80 U.S. (13 Wall.) 257, 263 (1871); Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). Where the state court decision is based on two grounds, a federal one and a non-federal one, jurisdiction by this Court will not be accepted if the non-federal ground is independent of the other and adequate to sustain the

determination. Enterprise Irrig. Dist. v. Canal Co., 243 U.S. 157, 163-64 (1917); Fox Film Corp. v. Muller, 296 U.S. 207, 209-210 (1935).

When a state court's opinion is ambiguous with regard to whether the claimed non-federal ground rested primarily on a federal ground, a new test has been applied in recent years. Michigan v. Long, 463 U.S. 1032, 1040-41 (1983), held that, when a state court decision appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of a possible state ground is not clear from the face of the opinion, it will be assumed that the state court believed that its decision was required by federal law. Under these circumstances only a "plain statement" in the judgment or opinion that the federal cases are being used only for guidance and do not themselves compel the result reached by the state court will make it clear that the determination is not based on

federal grounds. To the same effect: Harris v. Reed, 489 U.S. 255, 261-62 (1989).

The application of the New York rule that a tax payment may not be recovered, except pursuant to a provision of the statutory procedure law for the tax, when the payment is made without protest and not compelled by duress is plainly applicable here. The Appellate Division, in its opinion, plainly stated that this rule barred a recovery from the City in its action for money had and received (17a).

The rule does not rest on federal law and its application is not intertwined with federal grounds.

b. **Injunctive relief.**

The petitioners sought injunctive relief, but that relief could not apply to the Sweezys (239-241). The relief requested was an injunction from collecting or continuing to collect the tax (244). The Sweezys had paid the tax, and therefore such an injunction would

not help them. The injunction also sought to bar requiring any member of the Plaintiff Class to file a return or make any payments or deposits of tax (244-245). Assuming that the Sweezys, as petitioners, are members of the Plaintiff Class, here again a grant of the relief sought would not aid them. They could not be required to pay the tax because they had already paid it, and they could not be required to file any tax return because they had already filed returns for each of the years involved. See Los Angeles v. Lyons, 461 U.S. 95, 101-105 (1983).

c. **Declaratory judgment.**

The authority to render a declaratory judgment in New York is provided by New York Civil Practice Law and Rules, §3001. It states that such a judgment may be rendered, having the effect of a final judgment, as to the rights and other legal relations of the parties to "a justiciable controversy."

Here, as to the City, there is no issue as to the rights or other legal relations of the parties; and there is no justiciable controversy. Of the various petitioners, only Mr. Sweezy and his wife had any relationship to the City. They paid their income tax to the City for all the years prior to 1989 without protest and without the compulsion of duress. Hence, they cannot in this plenary action recover any tax payments or part thereof.

Whether or not they may recover some or all of their tax payments by following the procedure under the tax law, if Davis should be applied retroactively, cannot be decided or considered in this plenary case which disregards the tax procedure. Assuming or even accepting that these plaintiffs made timely application for refunds in accordance with the tax procedure law, the rights they have under that law cannot be decided in this plenary action. Any refund application made by the

Sweezys was not mentioned by them in their pleadings and was not raised in the State courts. An attempt to consider, as an issue before this Court, the impact of a refusal to grant a refund on an application under the tax law, when no final decision has yet been made under that procedure, would go beyond any issue raised in the present case.

Since there is no basis on which the Sweezys could recover their tax payments for the years up to and including 1988 in this plenary proceeding, and since the New York law now exempts them from paying the City tax on federal pension receipts for 1989 and thereafter, there are no legal rights left to be decided in the declaratory judgment action, and analogously there is no justiciable controversy to be disposed of in such a proceeding. N.Y. Public Research v. Carey, 42 N.Y.2d 527, 529-531 (1977); American Ins. Assn. v. Chu, 64 N.Y.2d 379, 383, 385-6 (1985); Cuomo v.

Long Island Lighting Co., 71 N.Y.2d 349, 354 (1988); Weingarten v. Town of Lewisboro, 77 N.Y.2d 926 (1991); Combustion Engineering Inc., v. Travelers Indemnity Co., 75 A.D.2d 777, 778 (1980), affd. with memo., 53 N.Y.2d 875 (1981).

This Court also uses a similar approach in deciding whether to accept matters brought to it for review. Braxton County Court v. West Virginia ex rel. Tax Comm'rs, 208 U.S. 192 (1908); Muskrat v. United States, 219 U.S. 346 (1911); Warth v. Seldin, 422 U.S. 490, 498-502 (1975); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 36-38 (1976). In dealing with federal declaratory judgment actions, the approach is analogous to that applied by New York to such actions. Coffman v. Breeze Corporations, Inc., 323 U.S. 316, 323-25 (1945) Eccles v. Peoples Bank, 333 U.S. 426, 431-435 (1948); Golden v. Zwickler, 394 U.S. 103,

108-110 (1969). See Poe v. Ullman, 367 U.S. 497, 501-508 (1961).

d. Class action.

It is not clear that the petitioners are seeking to bring up the denial of their application to have the matter treated as a class action. It is plain, however, that they may not do so. That issue has not finally been determined by the New York courts. An appeal can be taken to the New York Court of Appeals as of right or by permission of that Court only if the order appealed from "finally determines an action" (CPLR §§5601, 5602, 5611). A non-final determination normally cannot reach the Court of Appeals except by permission of the Appellate Division (CPLR §5713). These provisions are fully described in two leading texts. Cohen & Karger, The Powers of the New York Court of Appeals (1952), §1, p. 5, §84, pp. 358-9; Newman, New York Appellate Practice (1992), §11.02 [3][e], §11.05.

When the petitioners took an appeal as of right to the Court of Appeals, it was denied generally on the ground that "no substantial constitutional question is directly involved" (52a). Insofar as that appeal attempted to bring up the denial of a post-judgment motion to renew or reargue the denial of class certification, it was dismissed on the ground that that portion of the order does not "finally determine the action" (51a-52a). When subsequently the petitioners asked the Court of Appeals for permission to appeal to it, the Court denied the motion for leave to appeal, but it dealt separately with the matter of class certification (59a). It again decided that the denial of the motion to renew or reargue the denial of class certification did "not finally determine the action" (58a-59a).

These rulings by the Court of Appeals based on a lack of finality meant that this matter could only reach the Court of Appeals

by a grant of leave to appeal by the Appellate Division. The rulings extended the time in which to ask for such permission by thirty days from the dismissal or denial by the Court of Appeals [CPLR §5513(b), §5514(a)]. The petitioners, however, have never asked the Appellate Division for leave to appeal on either the class certification ground or on any of the other grounds. It is now too late to apply to the Appellate Division for such leave. Thus, this matter should not be entertained by this Court because there is no way "to make it certain that the case could go no further" in the State courts. Amer. Ry. Exp. Co. v. Levee, 263 U.S. 19, 20 (1923). Cf. Stratton v. Stratton, 239 U.S. 55 (1915).

In any event, the petitioners may have lost the right to review by the Court of Appeals with regard to class certification once that Court rejected any right to review by it on the basic merits of the action.

Even if the denial of class certification could be considered on grounds other than the failure to exhaust state remedies, it provides no sound basis for consideration by this Court. New York has repeatedly held that class action certification is inappropriate in a case involving governmental actions since subsequent plaintiffs will be adequately protected under the doctrine of stare decisis. Rivers v. Katz, 67 N.Y.2d 485 (1986), rearg. den., 68 N.Y.2d 809; Matter of Dumbleton v. Reed, 40 N.Y.2d 586, 589 (1976); Martin v. Lavine, 39 N.Y.2d 72, 75 (1976); Gandolfi v. City of Yonkers, 101 A.D.2d 188, 198-199 (1984) affd., for reasons stated in opinion below, 62 N.Y.2d 995 (1984); Conklin v. Town of Southampton, 141 A.D.2d 596 (1988).

e. 42 U.S.C. §1983

Petitioners do not have a cause of action under 42 U.S.C.§1983. In deciding whether a federal statute confers a right within the

meaning of that section, one must consider "whether the provision in question was 'intended to benefit' the putative plaintiffs". Dennis v. Higgins, __U.S.__, 111 S.Ct. 865, 871 (1991), citing Golden State Transit Corp v. Los Angeles, 493 U.S. 103, 108 (1989).

The federal statute here involved, 4 U.S.C §111, embodies the principles of intergovernmental tax immunity, which had their genesis in the Supremacy Clause and the federalism provisions of the Constitution. Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 810-814 (1989); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 816 (1819). It is evident from the rationale behind the doctrine of intergovernmental tax immunity and the legislative history for Section 111 that it was intended to benefit government operations rather than federal employees. Davis, supra, at p. 814; Graves v. N.Y. ex rel., O'Keefe, 306 U.S. 466, 481 (1939). See Report of the

Committee on Finance, submitted February 24, 1939, on the Public Salary Tax Act of 1939 (324). The availability of a §1983 remedy turns on whether the statute is intended to benefit the putative plaintiff, not whether or not the plaintiff is, in fact, benefited. Golden State, supra, 493 U.S. at 108. The fact that federal employees happen to benefit indirectly from section 111 by being free from discriminatory state taxation does not give rise to a right, the violation of which is actionable under §1983.

The petitioners allege that "[t]he respondents were directly involved in the enforcement of this unlawful scheme ... See, e.g., R.521-30." Petition, p. 22. However, none of the citations to the record relate to actions by City officials or employees.

Since, at least, 1975, the State Tax Commission has acted as administrator of this City income tax and has been empowered to adopt rules and regulations with regard to it.

1975 N.Y. Laws, ch. 881, §13 (model law, §1312; Admin. Code, §§T46-197(a), 200(a), now entitled Admin. Code, §§11-1797(a), 1800(a). Hafer v. Melo, __U.S.__, 112 S.Ct. 358 (1991), cited by petitioners, is not controlling where the named City officials did not perform the acts of which the petitioners complained.

The trial court held that the City respondents may not be sued for functions which were performed by State tax officials. The Appellate Division affirmed the trial courts rejection of the petitioners' §1983 claims. The Appellate Division noted that the City respondents are entitled to a qualified immunity defense, citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), since "the claimed right under 42 U.S.C. §111 was not clearly established until Davis."

The petitioners assert that the denial of class certification by the court below is "inconsistent in both purpose and effect with

the remedial objectives of the federal civil rights law," citing Felder v. Casey, 487 U.S. 131, 153. In further support of this proposition, the petitioners also cite Garrett v. Bamford, 538 F.2d 63, 71 (3d Cir), cert. denied, 429 U.S. 977 (1976), where the Court held that a suit could be brought against the state in federal court despite the Tax Injunction Act because a class action was not available in the state courts.

The petitioners, however, chose to initate suit in the state courts and the general rule is that "federal law takes the state courts as it finds them." Howlett v. Rose, 496 U.S. 356 (1990). Felder and Howlett represent narrow exceptions to this general rule. Felder involved a notice of claim prerequisite; Howlett a state law sovereign immunity defense. In both cases, the state law in question was "outcome - determinative", Felder, supra, 487 U.S. at 151, that is, the application of the

state statute could prohibit someone from prevailing in the §1983 litigation in question. In the case at bar, New York's class action statute only prohibits the §1983 litigation from proceeding as a class action. Nothing in the New York Civil Practice Law and Rules prevents individual litigants from either initiating their own litigation or waiting for the outcome of one lawsuit where the government entity automatically applies the ruling to those similarly situated under the doctrine of stare decisis.

f. **Summary**

The only plaintiffs involved with the City are the Sweezys. The sole relief that would would aid them would be recovery for money had and received since they paid the tax for the years involved. The record, however, fails to reveal that the payments were made under protest or compelled by duress. Hence, they

have no right to recover the tax payments in this plenary action. Obviously, the New York rule concerning protest or duress is not subject to review by this Court.

The cause of action for injunctive relief cannot assist the Sweezys since there is not the slightest indication that anything threatens them that might be enjoined.

Once it is recognized that the Sweezy's tax payments cannot be recovered because of failure to protest and the absence of duress, there is no basis for granting them declaratory judgment since there is no justiciable issue with the City in this plenary action. At best they seek an improper advisory opinion.

The class action certification sought by the Sweezys is not properly before this Court because they have not exhausted all efforts to obtain relief by the State courts. A motion to the Appellate Division with respect to that cause of action might have been granted,

permitting them to review the matter in the State Court of Appeals. In any event, the grounds on which class actions involving governmental bodies are denied are of such a nature that they are not regarded as reviewable by this Court.

The petition, with respect to all the causes of action thus far discussed in this subheading, therefore, should be denied since these cause of action raise state issues not reviewable by this Court. See Longshoreman v. Davis, 476 U.S. 380, 387 (1986).

The remaining cause of action is the class relief sought under 42 U.S.C. 1983. That provision would only apply if 4 U.S.C. 111 were designed to benefit federal employees, but its aim was to protect the federal government. Hence the petition based on the Section 1983 cause of action should also be denied.

POINT II

THE DECISION MADE BY THE STATE COURT THAT THE DETERMINATION IN THE DAVIS CASE SHOULD BE APPLIED PROSPECTIVELY IS SOUND.

The position of the City with respect to applying the Davis case prospectively has been advanced in the amicus brief of the City of New York in Harper v. Virginia Dept. of Taxation (91-794). It would merely add to the burden of this Court to repeat what was argued in that brief, and it would appear to be inappropriate, on a motion for certiorari, to extend that argument to cover even more fully the issues covered in that brief.[4]

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[4] We feel obliged to respond briefly to petitioners' charge that the writers of this brief engaged in duplicity in their brief as amicus in Harper v. Virginia (Pet. Br., p. 18 n.15). The petitioners attempt to show that we misled the Court when we said that "no case was brought to the courts which challenged state and local employees pension exemption while

(Footnote Continued)

We believe, however, that the application for certiorari against the City should be denied on the grounds advanced in Point I of this brief. If the Court does not deny the application, we would then be in accord with the request for certiorari since the retroactivity issue is already before this court in the Harper case and any opportunity to argue the matter or to advance additional arguments should not be lost.

(Footnote Continued)
taxing federal pensions until the Davis case in 1984." To show that we were wrong they do not rely on any case in any court. Instead, they rely on two administrative determinations, one in 1982 and one in 1984.

CONCLUSION

FOR THE REASONS SET FORTH IN POINT I, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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Respectfully submitted,

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